UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WSG 19A
Date Signed: August 10, 1979

MEMORANDUM

SUBJECT: Methods of Preventing States from Using Illegal Variances

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I. Introduction

Several primacy States within the Public Water System Supervision, e.g. Texas, Virginia, et al., either have or are planning to issue variances to water supply systems under circumstances clearly prohibited by the Safe Drinking Water Act (SDW Act), 42 USC §300f et seq. Variances were intended to be applied to water supply systems where the source of water was so poor that it could not meet the MCLs even after using the best available treatment technology. (See Attachment - Memorandum from General Counsel to Deputy Assistant Administrator for Drinking Water (May 21, 1979), and EPA's Guidance for the Issuance of Variances and Exemptions (1979) for detailed discussion of variances and exemptions.)

The States in question are issuing variances from MCLs, even though the MCLs can be met by the application of the best available treatment technology specified by the Agency. The suppliers, however, either simply cannot afford such a system, or could literally afford it, but have placed a higher priority on other public health needs. Congress has recently reiterated its intention that variances not be used in such situations. (See Attachment B: Report on Safe Drinking Water Act Authorizations, H.R. Rep. No. 96-186, 96th Cong., 1st Sess. 7n.4 (1979).) Clearly, these States have misinterpreted the law. The Office of Drinking Water has repeatedly and vigorously moved to correct these misinterpretations. Recently Mr. Kimm, the Deputy Assistant Administrator for Drinking Water, sent a memorandum to the Regions on this matter (see Attachment C).

Mr. Kimm has also asked us to analyze the range of potential enforcement responses to these erroneous State actions. The Agency may:

1. Do nothing and risk a disintegration of statutory framework and a total perversion of the intent of Congress.

2. Institute an administrative action against the States under §1413 (a) (4) of the SDW Act and 40 CFR §§142.12-142.13 (40 CFR 142.17 -- renumbered Primacy Rule 12/89) to withdraw primacy from the State for its abuse of discretion.

3. Institute enforcement actions directly against the water supply systems with erroneous variances under §§1414(a)(1) and 1414(b).

4. Institute an administrative action against the State under §1415(a)(1)(G) for its abuse of discretion. The Administrator, after the required notice and hearings, would promulgate variance revocations. 40 CFR §§142.23--142.24 or

5. Institute a civil action against the States under the Declaratory Judgment Act, 28 U.S.C. §§2201-02, declaring all the variances at issue null and void; interpreting the variance provision; and possibly ordering the State to rescind the variances at issue.

Alternative 1, do nothing, has been totally rejected by the Office of Drinking Water and Enforcement in this case because of the serious effects that such continued misinterpretation of the statute would have on the program. As a general principle, EPA cannot countenance actions by a State that are not in conformity with the law. Furthermore, issuing variances where exemptions are authorized runs counter to the statutory scheme created by Congress. Congress intended that water supply systems be placed on schedules with a firm deadline (January 1, 1981). This deadline was included in the Act to pressure water supplies to achieve compliance in the shortest possible time. Therefore, the result of granting these impermissible variances will be a delay in achieving compliance and a concomitant subversion of the will of Congress.

Seeking to withdraw primacy, alternative 2, is unacceptable also. Given the nature of the problem, i.e., the State's misinterpretation of the law, the remedy seems clearly excessive as a first step. Withdrawal of primacy would also be disruptive to the State's drinking water program because of the loss of Federal funds and place a severe strain on the working relationship between EPA and the State.

Alternatives 3 and 4, enforcing against each individual water supplier or initiating an administrative proceeding to rescind each variance, are too personnel and time consumptive. In either case, separate actions would be required at least in each State and against each water supplier. The wise use of the Agency's resources dictates other solutions be used.

Filing a declaratory judgment suite (Alternative 5) seems to be the preferred course of action. The remedy available from a declaratory judgment action precisely fits the Agency's need, i.e. the variances in the State in which it is brought will be void and there will be a judicial interpretation of the

variance provision that will set precedent that all States must follow. Additionally, the Agency, giving the States the benefit of the doubt, prefers to assert that the States involved have simply misinterpreted the law and not that they have abused their discretion. Since a declaratory judgment action is confined to questions of law, not discretion, the problems of proof will be less and a State will have an even more difficult time raising the "unreasonableness" of an MCL as a defense or mitigating factor. Finally, under Rule 57 of the Federal Rules of Civil Procedure an expedited hearing of a declaratory judgment action is available. For the reasons cited above, it is recommended that if a State refuses to rescind voluntarily the variances in question, the Agency should bring a declaratory relief action against one offending State.

## III. Declaratory Judgement Action

The following describes the basic elements of a declaratory judgment action and how it applies to the variance problem.

The Declaratory Judgment Act, 8 U.S.C. §2201, provides that

> [i]n a case of actual controversy within its jurisdiction . . ., any court of the United States upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. (Emphasis added.)

The Agency could seek an order requiring the State to rescind the variances at issue under 28 USC §2202 which provides that:

> [f]urther necessary or proper relief based on a declaratory judgement of decree may be granted after reasonable notice and hearing against any adverse party whose rights have been determined by such judgments.

Rule 57 of the Federal Rules of Civil Procedure repeats the statutory requirements and provides for a speedy hearing, i.e.

> The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C. §2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided by Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the

> calendar. (Emphasis added.)

Additionally, because there will be no material issues of fact in dispute, only legal issues,[2/] a motion for a summary judgment under Rule 56 of the Federal Rules of Civil Procedure would also be appropriate. This motion, if successful, would substantially shorten the time between the filing of the action and the receipt of a judicial opinion.

The essential questions at issue in a declaratory judgment action in this case are:

1. Whether the United States may bring such an action;
2. Whether there is an actual controversy in this case;
3. Why the court should exercise its discretion in this case; and
4. What is the relief desired.

The United States can bring an action under the Declaratory Judgment Act, even against a State. Public Utilities Comm'n of State of California v. United States, 355 U.S. 534 (1958); United States v. Pennsylvania Environmental Hear. Bd., 377 F.Supp. 545, 548 (M.D. Penn. 1974).

One test of whether there is an actual controversy is that:

> [t]he controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interest. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. (Emphasis added.)
> AETNA Life Insurance Co. of Hartford, Conn. v. Haworth, 300 U.S. 277, 240-41 (1937).

In the case of the disputed variances, there is an actual controversy. This case presents a classical declaratory judgment issue, i.e., a dispute over a statute's meaning. The State and water suppliers hold that the variances are lawful and issued in accordance with the Safe Drinking Water Act and the United States argues that the variances are unlawful and totally prohibited in these cases. There is not a hypothetical state of facts, but the facts of each water suppliers' variance. The record will contain the undisputed facts and copies of the variances. The relief in this case is specific, i.e., a declaration that the variances are void and unlawful, plus an order to the State to rescind the variances. The parties in a variance case have adverse legal interest, particularly if the water suppliers are joined as parties. There are sanctions that EPA can bring against the State for its action and EPA will be hampered in any enforcement action by the variances issued by the State. If the variances are declared void, the water suppliers are liable in citizen suits or enforcement actions. Finally, the United States has a legal responsibility under the Safe Drinking Water Act to ensure that the States are properly implementing the Act and that suppliers are complying with the Act's requirements.

The granting of a declaratory judgement is within the discretion of the court. See 6A Moore's

Federal Practice §57.08; Brillant v. Excess Inc. Co. 316 U.S. 491, 494 (1942). In deciding whether to grant a declaratory judgment courts consider the likelihood that the relief requested will resolve the controversy, the convenience of the parties, the public interest, and the relative convenience of other remedies. Bituminous Coal Operator's Ass'n, Inc. v. International Union, United Mine Workers of America, 585 F.2d. 587 (3rd Cir., 1978). All these factors in our case argue in favor of the court exercising its discretion. Given the strong judicial and public interest in protecting the public health, the fact that this action is the least intrusive into the State's program, the convenience to all parties of resolving the issues immediately and in one action, the long history of attempting to obtain voluntary rescissions, and the importance of a decision to the integrity of the Safe Drinking Water Act program, the district court should have no hesitation in exercising its discretion in this case.

As mentioned earlier, it would probably be wise to join as parties all the water suppliers who have been issued the variances at issue. Given the nature of their interest in the outcome, they may be necessary parties.

Conclusion

In sum of the methods for proceeding against the States who have issued unlawful variances, a declaratory judgment action seems most suited to EPA's needs. The facts of this situation fit clearly within the traditional pattern of a declaratory judgment case. Given the strong legal position the Agency has, the speed with which such an action can be brought, and the other practical advantages, this alternative is highly preferred, if it becomes necessary to go to court against a State.

FOOTNOTES

1/ Neither cost nor the technical feasibility of meeting a particular MCL can be factual issues in a declaratory judgment proceeding. Those factors will have already been taken into consideration in determining the best technology treatment techniques. Section 1415(a)(1)(A). See 40 CFR §142.40. See EPA, Manual of Treatment Techniques for meeting the Interim Primary Drinking Water Regulations (1977). Also, only the Administrator, and not States, can make this determination. The determination is a uniform national decision and not a case-by-case decision. Section 1415 (a)(1)(A). As a practical matter this problem has arisen primarily with regard to variances from fluoride MCLs. There is no realistic impossibility argument, only an argument that, given the economic situation of the small water supplier, the expense is too great. In Getty Oil Co. v. Ruckelshaus, 467 F.2d 349, 356 (3d Cir., 1972), the court held that a polluter could not use the Declaratory Judgment Act to challenge "whether the regulation is unnecessary, unreasonable, or capricious,.." because the statute (the Clean Air Act) specifically designated a mechanism for judicial review of such matters. Since the polluter had not challenged the underlying regulations he could not challenge them in a declaratory judgement action. The Safe Drinking Water Act's judicial review provision is derived from the Clean Air Act. 120 Cong. Rec. §20243 (daily ed. Nov. 26, 1974). It too provides a specific method of challenging the unreasonableness of the regulations. Section 1448. Although not dispositive of the issue, this case supports the view that a district court should not review the reasonableness of the MCL in a declaratory judgment action. Finally, a motion for partial summary judgment can always be made on the legal issues alone, if the court decides that there are factual issues.

2/ The courts have held that a declaratory judgment "is not to be declined merely because of the existence of another remedy . . ." Yellow Cab Co. v. City of Chicago 186 F.2d 946, 950 (7th Cir., 1951). The plain language of 28 USC §2201 and Rule 57 of the Rules of Civil Procedure, quoted in the text, above, specifically state that other adequate remedies do not preclude a declaratory judgment. The administrative remedy provided in §1415(a)(1)(C) need not to be exhausted before a declaratory judgment is issued because the result of the administrative proceeding leaves the legal issue unresolved and only attaches the questions to a particular litigant. See Public Utilities Comm'n of the State of California v. United States, 355 U.S. 532, 539-40 (1958). Furthermore, the doctrine of exhaustion of remedies usually applies to a person who has failed to pursue his legal rights before an Agency, not against an Agency.